

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Wireless Services, Inc.	)	File No. EB-02-TS-018
Washington, DC	)	NAL/Acct. No. 200232100002
	)	FRN 0006-1660-29
	)	

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: May 9, 2002**

**Released: May 20, 2002**

By the Commission:

**I. INTRODUCTION**

1. This *Notice of Apparent Liability for Forfeiture* (“NAL”) follows an investigation into whether AT&T Wireless Services, Inc. (“AT&T Wireless”) violated the Enhanced 911 (“E911”) Phase II rules<sup>1</sup> with respect to its Global System for Mobile Communications/General Packet Radio Service network (“GSM network”) and whether AT&T Wireless made inaccurate statements in its request for a waiver of the E911 Phase II rules for its GSM network. Based on this investigation, we find that AT&T Wireless apparently (1) failed to begin selling and activating location-capable handsets by October 1, 2001, in willful and repeated violation of Section 20.18(g)(1)(i) of the Commission’s Rules (“Rules”), without even requesting a waiver;<sup>2</sup> (2) failed to implement any network or infrastructure upgrades necessary to provide E911 Phase II service and begin providing service within six months of a valid request by a Public Safety Answering Point (“PSAP”) or by October 1, 2001, whichever is later, in willful and repeated violation of Section 20.18(g)(2) of the Rules, again without even requesting a waiver;<sup>3</sup> (3) failed to notify the Commission within 30 days that information contained in its E911 waiver request was no longer substantially accurate or complete in all respects, in willful and repeated violation of Section 1.65 of the Rules;<sup>4</sup> and (4) failed to make a supplementary filing notifying the Commission that it was not going to comply with the deployment schedule requirements set forth in the E911 rules in willful and repeated violation of the Commission order granting it a waiver of the E911 rules for its GSM network. For the reasons discussed below, we find AT&T Wireless apparently liable for a forfeiture in the amount of two million, two hundred thousand dollars (\$2,200,000).

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<sup>1</sup> 47 C.F.R. § 20.18.

<sup>2</sup> 47 C.F.R. § 20.18(g)(1)(i).

<sup>3</sup> 47 C.F.R. § 20.18(g)(2).

<sup>4</sup> 47 C.F.R. § 1.65.

## II. BACKGROUND

2. Under Phase II of the FCC's wireless E911 rules, wireless carriers are required to provide to the designated PSAP the location of wireless 911 callers, a capability known as Automatic Location Identification ("ALI"), using handset-based or network-based location technologies.<sup>5</sup> The rules provide that handset-based location technologies must provide the location of wireless 911 calls with an accuracy of 50 meters for 67 percent of calls and 150 meters for 95 percent of calls.<sup>6</sup> Carriers using a handset-based solution must begin to offer one entry-level model with location capability no later than October 1, 2001, and must ensure that 95 percent of their customers have location-capable handsets no later than December 31, 2005.<sup>7</sup> In addition, within six months of a valid PSAP request or by October 1, 2001, whichever is later, a carrier using a handset-based solution must implement the network and infrastructure upgrades necessary to provide E911 Phase II service and begin delivering ALI to the PSAP.<sup>8</sup>

3. For carriers choosing a network-based solution, the rules provide that the technology must report the location of wireless 911 calls with an accuracy of 100 meters for 67 percent of calls and 300 meters for 95 percent of calls.<sup>9</sup> A carrier using a network-based solution must provide ALI to 50 percent of its coverage area, or 50 percent of its population, beginning on October 1, 2001 or within six months of a PSAP request, whichever is later, and to 100 percent of callers within 18 months of that request or by October 1, 2002, whichever is later.<sup>10</sup> Wireless carriers subject to the rules were directed to report their Phase II plans, including the technologies they plan to use, by November 9, 2000.<sup>11</sup>

4. On November 9, 2000, AT&T Wireless filed an E911 Phase II report in which it stated that it was not in a position to choose between a handset and network overlay solution and that it would file an amended report.<sup>12</sup> In its Amended E911 Phase II Report, filed December 9, 2000, AT&T Wireless stated that it planned to overlay a GSM platform to its existing Time Division Multiple Access network.<sup>13</sup> AT&T Wireless also stated that it intended to implement a hybrid network- and handset-based technology called Enhanced Observed Time Difference of Arrival ("E-OTD") across its GSM network and that it would make E-OTD available immediately upon deployment of its GSM network.<sup>14</sup>

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<sup>5</sup> See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676 (1996).

<sup>6</sup> 47 C.F.R. § 20.18(h)(2).

<sup>7</sup> 47 C.F.R. § 20.18(g)(1).

<sup>8</sup> 47 C.F.R. § 20.18(g)(2).

<sup>9</sup> 47 C.F.R. § 20.18(h)(1).

<sup>10</sup> 47 C.F.R. § 20.18(f).

<sup>11</sup> 47 C.F.R. § 20.18(i).

<sup>12</sup> AT&T Wireless Services, Inc. E911 Phase II Report, CC Docket No. 94-102 (November 9, 2000).

<sup>13</sup> AT&T Wireless Services, Inc. Amended E911 Phase II Report, CC Docket No. 94-102 (December 9, 2000).

<sup>14</sup> *Id.* at 3.

5. On April 4, 2001, AT&T Wireless filed an E911 Phase II implementation plan and request for waiver of the E911 Phase II rules to permit it to deploy E-OTD throughout its GSM network.<sup>15</sup> In its waiver request, AT&T Wireless asserted that E-OTD would be implemented simultaneously with the market-by-market rollout of the GSM network and that it would provide E-OTD-capable handsets to GSM subscribers when the GSM network comes online so that the GSM network is Phase II capable from day one.<sup>16</sup> However, AT&T Wireless stated that while E-OTD ultimately will meet and even exceed the Commission's accuracy requirements for handset-based location technologies, E-OTD technology will not initially meet the accuracy requirements.<sup>17</sup> Accordingly, AT&T Wireless requested relief from the location accuracy requirements for handset-based solutions set forth in Section 20.18(h) of the Rules to permit the deployment of E-OTD technology for its GSM network.

6. Subsequently, in several related pleadings, AT&T Wireless reaffirmed that its GSM network would be E-OTD capable from the date of deployment. In its May 21, 2001 reply comments on the waiver request, AT&T Wireless stated that "in contrast to VoiceStream, AT&T has the unique opportunity to make E-OTD available in its GSM network as that network is deployed so that AT&T will not need to use an interim solution (such as VoiceStream's NSS) in order to accommodate legacy handsets" and that it "is working with its vendors to ensure that the GSM handsets sold to AT&T's subscribers will be E-OTD location capable from day one."<sup>18</sup> On May 10, 2001, the Wireless Telecommunications Bureau issued an order which, among other things, directed AT&T Wireless to provide further information on its GSM rollout, including "any information establishing that AT&T's GSM network will be 100% compliant with the Commission's E911 Phase II Location Technology Implementation Rules from the date of deployment of the GSM network."<sup>19</sup> In its May 31, 2001 partial response to this order, AT&T Wireless stated that it "plans to implement E-OTD simultaneously with the market-by-market rollout of the GSM network so that E-OTD will be available to all GSM subscribers from day one."<sup>20</sup> On August 6, 2001, AT&T Wireless submitted a letter to the Wireless Telecommunications Bureau to provide specific milestones for achieving compliance with the E911

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<sup>15</sup> AT&T Wireless Services, Inc., Request for Waiver of the E911 Phase II Location Technology Implementation Rules, filed April 4, 2001 ("*AT&T Wireless Waiver Request*"). AT&T also requested a waiver of the E911 Phase II rules to permit it to deploy a network-based technology called Mobile-Assisted Network Location System ("MNLS") for its TDMA network. After numerous parties including public safety organizations and location technology vendors challenged AT&T Wireless's proposal to use MNLS for its TDMA network, AT&T Wireless filed a letter on September 17, 2001 amending its request for relief with respect to its TDMA network. Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless Services, Inc., to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, CC Docket No. 94-102 (September 17, 2001). In lieu of implementing MNLS as its network-based solution for its TDMA network, AT&T Wireless sought permission to deploy either TruePosition's or Grayson Wireless's network overlay technologies. The amended waiver request regarding AT&T Wireless's TDMA network is pending.

<sup>16</sup> *AT&T Wireless Waiver Request*, at 5.

<sup>17</sup> *Id.*

<sup>18</sup> Reply Comments of AT&T Wireless Services, Inc., CC Docket No. 94-102, at 3 (May 21, 2001)

<sup>19</sup> *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket 94-102, Order, 16 FCC Rcd 9561, 9563 (Wireless Tel. Bur. 2001).

<sup>20</sup> Partial Response of AT&T Wireless Services, Inc. to Order of the Wireless Telecommunications Bureau, CC Docket No. 94-102, at 5 (May 30, 2001).

Phase II accuracy requirements in connection with its waiver request and in this letter reiterated that “E-OTD will be implemented along with the market-by-market roll-out of AWS’s GSM network.”<sup>21</sup>

7. On October 2, 2001, the Commission adopted an order approving AT&T Wireless’s plan to deploy E-OTD throughout its GSM network and granting AT&T Wireless a temporary, conditional waiver of the accuracy requirements for handset-based location technologies to permit implementation of this plan (“*GSM Waiver Order*”).<sup>22</sup> The *GSM Waiver Order* relied heavily on AT&T Wireless’s representations that its GSM network would be E-OTD capable from the date of deployment. Specifically, the Commission found that AT&T Wireless’s implementation plan for its GSM network was justified by the overall benefits to public safety of AT&T Wireless’s proposed location solution, “particularly its ability to deploy E-OTD concurrently with the deployment of its new GSM network.”<sup>23</sup> Moreover, the Commission found that AT&T Wireless’s “inability to meet the handset-based accuracy standards is offset by the fact that ALI-capable handsets will be rapidly deployed in the GSM network and that all GSM handsets will be E-OTD-capable,” thus ensuring that there will be no legacy handset problem.<sup>24</sup> The Commission granted AT&T Wireless’s waiver request subject to the following four specific conditions: (1) that, effective October 1, 2001, all E-OTD-capable handsets provide ALI with an accuracy of 100 meters/67 percent of calls and 300 meters/95 percent of calls; (2) that all E-OTD-capable handsets sold and activated on or after October 1, 2003 comply with an accuracy of 50 meters/67 percent of calls and 150 meters/95 percent of calls; (3) that AT&T Wireless file Quarterly Reports on its progress and compliance with the terms and conditions of its implementation plan and the E911 rules beginning February 1, 2002 and continuing through November 1, 2003; and (4) that, in the event that its E-OTD solution fails to comply with the accuracy requirements by October 1, 2003, AT&T Wireless propose a solution that does comply with those requirements and the other applicable Phase II rules.<sup>25</sup> The Commission also stated that AT&T Wireless remains subject to all other requirements of the E911 rules apart from those specifically modified in the *GSM Waiver Order*.<sup>26</sup>

8. In December 2001, after receiving reports from various sources that AT&T Wireless had begun deploying its GSM network but was not offering E-OTD-capable handsets, Commission staff requested a meeting with AT&T Wireless. On December 21, 2001, Commission staff met with AT&T Wireless. At this meeting, AT&T Wireless acknowledged that it was selling and distributing handsets that are not E-OTD-capable for use on its GSM network and stated that it had been unable to deploy E-OTD-capable handsets due to vendor delays.

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<sup>21</sup> Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless Services, Inc., to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, CC Docket No. 94-102, at 2 (August 6, 2001).

<sup>22</sup> *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, (Request for Waiver by AT&T Wireless Services, Inc.)*, CC Docket No. 94-102, 16 FCC Rcd 18253 (2001) (“*GSM Waiver Order*”).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 18258.

<sup>25</sup> *Id.* at 18262.

<sup>26</sup> *Id.* at 18261.

9. On January 15, 2002, the Enforcement Bureau sent a letter of inquiry (“LOI”) to AT&T Wireless, requesting additional information concerning AT&T Wireless’s deployment of its GSM network and its sale and distribution of GSM handsets that are not E-OTD-capable.<sup>27</sup> AT&T Wireless submitted a response to the LOI on February 4, 2002,<sup>28</sup> and supplemented this response on February 19, 2002.<sup>29</sup> In its response to the LOI, AT&T Wireless stated that it began providing GSM service and selling and distributing non-E-OTD-capable handsets for use on its GSM network in Seattle on July 17, 2001.<sup>30</sup> AT&T Wireless stated that its July 2001 launch of GSM service in Seattle was limited to “enterprise” customers (i.e., customers who are part of a larger enterprise or business with a designated sales agent) and that non-E-OTD-capable handsets were not available in retail centers until the commercial launch of its GSM network in four markets on October 2, 2001. AT&T Wireless also indicated that it was currently providing GSM service with non-E-OTD-capable handsets in 11 markets: Seattle, Portland, Las Vegas, Phoenix, Detroit, South Florida, Lansing, Grand Rapids, Chicago, Indianapolis, and Kansas City.<sup>31</sup>

10. AT&T Wireless asserted in its LOI response that it is selling handsets that are not E-OTD-capable for use on its GSM network because its vendors were not ready to deliver E-OTD-capable handsets and other E-OTD network equipment when it launched its GSM service.<sup>32</sup> It asserted that some handset vendors did not have E-OTD-capable handsets available, while others had E-OTD-capable handsets available, but delays in the availability of network equipment prevented it from testing those handsets on an operational E-OTD-equipped network. AT&T Wireless acknowledged that concerns were raised within the company in Spring 2001 about the availability of E-OTD-capable handsets, but it maintained that “key decision-makers” did not have the same concerns. AT&T Wireless indicated in its LOI response that non-E-OTD-capable handsets intended for use on its GSM network were first delivered to its warehouses on June 24, 2001.<sup>33</sup> Nevertheless, AT&T Wireless stated that it was during a July 2001 review of its E911 Phase II plan that senior AT&T Wireless personnel learned that E-OTD-capable handsets would not be available before its initial launch of GSM service in Seattle on July 17, 2001.<sup>34</sup>

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<sup>27</sup> Letter from Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau, to Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless Services, Inc. (January 15, 2002).

<sup>28</sup> Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless Services, Inc., to Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau (February 4, 2002).

<sup>29</sup> Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless Services, Inc., to Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau (February 19, 2002) (“*LOI Response*”).

<sup>30</sup> *Id.* at 1.

<sup>31</sup> *Id.* at 2. In its request for limited modification of the *GSM Waiver Order*, filed three days before its response to the Enforcement Bureau LOI, AT&T Wireless indicated that it began offering commercial GSM service in Seattle, Portland, Las Vegas and Phoenix on October 2, 2001, in Detroit on October 23, 2001, and in South Florida, Lansing, Grand Rapids, Chicago, Indianapolis, and Kansas City in November and December 2001. AT&T Wireless Services, Inc. Request for Limited Modification of E911 Phase II Waiver, CC Docket 94-102, at 2 (filed February 1, 2002).

<sup>32</sup> *LOI Response* at 4.

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.* at 4-5.

AT&T Wireless asserted that it believed at that time that testing would be complete and handsets would be commercially available from at least certain vendors by December 2001. AT&T Wireless identified six senior-level employees who knew on or around July 16, 2001 that all handsets sold and/or distributed by AT&T Wireless for use on its GSM network would not be E-OTD-capable.<sup>35</sup> AT&T Wireless also indicated that two of these employees were involved in the preparation and review of the waiver request and subsequent related pleadings.<sup>36</sup> Finally, documents provided by AT&T Wireless with its LOI response indicate that AT&T Wireless projected in late July/early August 2001 that it would have a significant number of legacy (i.e., non-E-OTD-capable) handsets on its GSM network. We understand that AT&T Wireless continues to sell non-E-OTD-capable handsets today.

11. On February 1, 2002, AT&T Wireless filed its first Quarterly Report on its progress and compliance with the terms and condition of its E911 Phase II implementation plan set forth in the *GSM Waiver Order* and the E911 rules.<sup>37</sup> Among other things, the Quarterly Report indicates that, as of February 1, 2002, there were at least 12 valid requests from PSAPs for Phase II service on AT&T Wireless's GSM network which have been pending for six months or longer.<sup>38</sup>

12. On February 1, 2002, after receipt of the Enforcement Bureau's LOI, AT&T Wireless also filed a request for limited modification of the implementation plan approved by the Commission in the *GSM Waiver Order*.<sup>39</sup> In the waiver modification request, AT&T Wireless requests that its GSM waiver be modified as follows: (1) In order to address the legacy base of non-E-OTD-capable handsets, AT&T Wireless must deploy a network software solution ("NSS") by December 31, 2002, without regard to PSAP request; (2) AT&T Wireless must deploy E-OTD technology in its GSM network by December 31, 2002 for all valid PSAP requests pending as of June 30, 2002, and must implement all valid PSAP requests received after June 30, 2002 within six months, as required under the Phase II E911 rules; and (3) AT&T Wireless must offer at least one E-OTD-capable GSM handset for sale by September 1, 2002; 50 percent of new GSM handsets sold and activated must be E-OTD-capable by February 28, 2003; and

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<sup>35</sup> *Id.* at 11.

<sup>36</sup> *Id.* at 10. AT&T Wireless also identified two in-house attorneys who participated in the preparation and review of the waiver request and related pleadings, but claimed attorney-client and work product privilege with respect to the date on which they became aware that all handsets sold and/or distributed by AT&T Wireless for use on its GSM network would not be E-OTD-capable. *Id.* at 7-11.

<sup>37</sup> AT&T Wireless Services, Inc. Quarterly Report, CC Docket No. 94-102 (filed February 1, 2002).

<sup>38</sup> The Quarterly Report indicates that the following PSAPs' requests for Phase II service are valid and have been pending for at least six months: in Florida, Marion County (filed 6/22/01); in Illinois, St Clair County ETSB (filed 9/13/00), Village of Barrington Hills (filed 4/9/01), and Village of Vernon Hills Police Department (filed 6/19/01); in Indiana, Ripley County (filed 4/18/01), and Lake County Sheriff's Department (filed 4/26/01); in Oregon, North Marion County Communications, Clackamas County Communications, Portland Bureau of Emergency Communications, Central Lane Communications Center, and Washington County Consolidated Communications (all filed 4/17/01); and in Washington, Clallam County Sheriff's Department (filed 7/26/01). In addition, the Quarterly Report indicates that the following two PSAP requests for Phase II service have been pending for at least six months, but does not indicate whether AT&T Wireless believes the requests to be valid: in Florida, Volusia County Sheriff's Office (filed 6/27/01) and Nassau County Sheriff Department (filed 4/12/01). *Id.* at Appendix I and II.

<sup>39</sup> AT&T Wireless Services, Inc. Request for Limited Modification of E911 Phase II Waiver, CC Docket 94-102 (filed February 1, 2002).

100 percent of new GSM handsets sold and activated must be E-OTD-capable by June 30, 2003.<sup>40</sup> This waiver modification request is pending.

### III. DISCUSSION

#### A. Violations of E911 Rules

13. Section 20.18(g)(1)(i) of the Rules requires wireless carriers using a handset-based Phase II solution to begin selling and activating one entry-level handset model with location capability no later than October 1, 2001. The record before us indicates that, as of February 19, 2002, AT&T Wireless had not yet begun selling and activating any handsets with location capability for its GSM network. Furthermore, while the mere filing of a waiver request obviously does not excuse a company from non-compliance, here it is significant that AT&T Wireless did not even seek a waiver of this requirement until February 1, 2002 (after the Enforcement Bureau's LOI regarding AT&T Wireless's potential non-compliance), notwithstanding the fact that it apparently knew at least as early as July 2001 that it would not have E-OTD-capable handsets for use with its GSM network by October 1, 2001. As the Commission stated in the *GSM Waiver Order*, AT&T Wireless remains subject to all requirements of the E911 rules apart from those specifically modified in that order.<sup>41</sup> Accordingly, we conclude that AT&T Wireless has apparently willfully and repeatedly violated Section 20.18(g)(1)(i).<sup>42</sup>

14. Section 20.18(g)(2) of the Rules requires wireless carriers to implement any network or infrastructure upgrades necessary to provide E911 Phase II service and begin providing Phase II service within six months of a valid PSAP request for Phase II service or by October 1, 2001, whichever is later. The record in this proceeding indicates that, as of February 1, 2002, AT&T Wireless had at least 12 valid PSAP requests for Phase II service on its GSM network which have been pending for six months or longer.<sup>43</sup> Again, AT&T Wireless did not seek a waiver of Section 20.18(g)(2) until February 1, 2002, even though it clearly knew sometime prior to October 1, 2001 that it would not comply with this requirement. Accordingly, we conclude that AT&T Wireless has apparently willfully and repeatedly violated Section 20.18(g)(2).<sup>44</sup>

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<sup>40</sup> *Id.* at 13.

<sup>41</sup> *GSM Waiver Order*, 16 FCC Rcd at 18261.

<sup>42</sup> Section 312(f)(1) of the Communications Act of 1934, as amended, ("Act") provides that "the term 'willful,' when used with reference to the commission or omission of any act, means the conscious or deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission ...." 47 U.S.C. § 312(f)(1). This definition applies to the term "willful" as used in Section 503(b) of the Act. See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). A violation is repeated if, among other things, it continues over more than one day. *Id.* at 4388.

<sup>43</sup> See paragraph 11, *supra*.

<sup>44</sup> We note that the findings in this *NAL* relate solely to AT&T Wireless's GSM network. The Commission previously referred to the Enforcement Bureau a matter concerning AT&T Wireless's TDMA network.

**B. Failure to Timely Disclose Inaccurate Statements in its Waiver Request**

15. The Commission staff initiated this investigation in part to determine whether AT&T Wireless intentionally misrepresented facts in its request for a waiver of the E911 Phase II rules for its GSM network. The record before us raises potentially serious concerns. In its August 6, 2001 letter to the Wireless Telecommunications Bureau, AT&T Wireless reaffirmed that “E-OTD will be implemented along with the market-by-market roll-out of AWS’s GSM network.”<sup>45</sup> Given that E-OTD was not in fact implemented with AT&T Wireless’s initial launch of GSM service in Seattle on July 17, 2001,<sup>46</sup> it is apparent that this statement is inaccurate. Moreover, AT&T Wireless admits that at least two senior employees who were involved in the preparation and review of the August 6, 2001 letter knew on or around July 16, 2001 that E-OTD-capable handsets would not be available before the initial launch of GSM service in Seattle.

16. The Enforcement Bureau continues to investigate this matter to determine whether AT&T Wireless may have engaged in misrepresentation in violation of Section 1.17 of the Rules.<sup>47</sup> The base amount for any forfeiture for a violation of Section 1.17 is \$120,000, the statutory maximum.<sup>48</sup> In order to expedite any enforcement action that may be appropriate at the conclusion of the Bureau’s investigation of this matter, for the limited purposes of this matter, we delegate authority to the Chief, Enforcement Bureau, to issue a Notice of Apparent Liability and Forfeiture Order, if appropriate, up to the statutory maximum of \$120,000 rather than the \$100,000 limit in our delegation rules.

17. We conclude at this juncture, however, that AT&T Wireless apparently willfully and repeatedly violated Section 1.65 of the Rules. Under Section 1.65(a), applicants must disclose inaccuracies in a pending application “as promptly as possible and in any event within 30 days” whenever: (1) information furnished in the pending application “is no longer substantially accurate or complete in all significant respects”; or (2) “there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application.”<sup>49</sup> The purpose of Section 1.65 is to inform the Commission, the public, and concerned parties of material changes in the application.<sup>50</sup> Furthermore, Section 1.65 imposes an affirmative

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<sup>45</sup> Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless Services, Inc., to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, CC Docket No. 94-102, at 2 (August 6, 2001).

<sup>46</sup> We find it immaterial for purposes of this *NAL* that the initial launch of GSM service in Seattle was limited to AT&T Wireless’s “enterprise” customers.

<sup>47</sup> Section 1.17 of the Rules states in relevant part that “[n]o applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.” 47 C.F.R. § 1.17.

<sup>48</sup> See *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

<sup>49</sup> 47 C.F.R. § 1.65(a).

<sup>50</sup> See *Pinelands, Inc. and BHC Communications, Inc.*, 7 FCC Rcd 6058, 6064 n. 25 (1992); *WPIX, Inc.*, 33 FCC 2d 782, 783-84 (1972).



obligation on regulated entities to inform the Commission of the facts needed to fulfill its duties. Our decisions rely heavily on the completeness and accuracy of applicants' submissions because we do not have the resources to verify independently each and every representation made in the thousands of pages submitted to us each day.

18. The record indicates that non-E-OTD-capable handsets intended for use on AT&T Wireless's GSM network were first delivered to its warehouses on June 24, 2001. Thus, AT&T Wireless apparently ordered these handsets sometime prior to that date. Nevertheless, AT&T Wireless stated that it was on or around July 16, 2001 that senior-level employees became aware that all handsets sold and distributed for use on its GSM network would not be E-OTD-capable. Two of these employees were directly involved in the preparation and review of AT&T Wireless's waiver request and subsequent related pleadings and therefore knew that AT&T Wireless had represented to the Commission that the GSM network would be E-OTD capable from day one and that there would be no legacy handsets. Thus, even giving AT&T Wireless every benefit of the doubt regarding when it incurred obligations under Section 1.65, it is apparent that AT&T Wireless had a clear obligation beginning no later than 30 days from July 16, 2001, to report to the Commission that its waiver request was substantially inaccurate.

19. We also conclude that AT&T Wireless's waiver request was "pending," as that term is defined in Section 1.65, during the relevant time period. Under Section 1.65, an application is "pending" from the time that the Commission accepts it for filing until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.<sup>51</sup> AT&T Wireless's waiver request was pending from April 4, 2001, the date it was filed, until November 13, 2001, the date that the *GSM Waiver Order* was no longer subject to reconsideration by the Commission.<sup>52</sup>

20. As noted above, Section 1.65 requires applicants to furnish additional or corrected information whenever prior filings are "no longer substantially accurate or complete in all significant respects" or "there has been a substantial change as to any other matter which may be of decisional significance ...."<sup>53</sup> We conclude that AT&T Wireless's representations in the waiver request that the GSM network would be E-OTD capable from the date of deployment and that there would be no legacy handsets were of such significance that it apparently should have notified the Commission when it learned otherwise. The apparent significance of these representations is clear from the record and should have been quite evident to AT&T Wireless. The Wireless Telecommunications Bureau issued an order on May 10, 2001 which, among other things, specifically directed AT&T Wireless to provide information establishing that its GSM network will be 100% compliant with the E911 Phase II rules from the date of deployment.<sup>54</sup> In addition, the Commission relied heavily on the representations in AT&T Wireless's waiver request in the *GSM Waiver Order*.<sup>55</sup> Due to its reliance on these representations, the Commission

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<sup>51</sup> 47 C.F.R. § 1.65(a).

<sup>52</sup> Under Section 1.106(f) of the Rules, a petition for reconsideration must be filed within 30 days of the date of public notice of the final Commission action. 47 C.F.R. § 1.106. The *GSM Waiver Order* was released on October 12, 2001. AT&T Wireless did not seek reconsideration of that order. Thus, November 13, 2001 is the date that the *GSM Waiver Order* was no longer subject to reconsideration by the Commission.

<sup>53</sup> 47 C.F.R. § 1.65(a).

<sup>54</sup> *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket 94-102, Order, 16 FCC Rcd 9561, 9563 (Wireless Tel. Bur. 2001).

<sup>55</sup> See paragraph 7, *supra*.

did not include in the *GSM Waiver Order* any benchmarks for the sale and activation of E-OTD-capable handsets or the provision of Phase II service to PSAPs, nor did it require AT&T Wireless to implement a “safety net” location technology solution, like the NSS solution which other wireless carriers using E-OTD technology are required to implement, for the legacy handsets.

21. We find it particularly troubling that AT&T Wireless did not promptly bring the inaccuracies in its waiver request to the Commission’s attention once the Commission issued the *GSM Waiver Order*. There can be no doubt that AT&T Wireless knew when the *GSM Waiver Order* was issued that the Commission had relied substantially on its representations that the GSM network would be E-OTD capable from the date of deployment and that there would be no legacy handsets. As discussed above, AT&T Wireless’s waiver request was pending under Section 1.65, and therefore it remained obligated to inform the Commission of inaccuracies in the waiver request, until the *GSM Waiver Order* was no longer subject to reconsideration on November 13, 2001. Additionally, we note that the *GSM Waiver Order* explicitly stated that while AT&T Wireless’s Quarterly Reports should be the principal vehicle for providing the Commission with notice of anticipated problems, AT&T Wireless should notify the Commission through a supplemental filing to the extent that unexpected problems affecting its ability to perform arise in the period between reports.<sup>56</sup> AT&T Wireless, however, did not make such a supplemental filing. Indeed, the Commission staff first learned in December 2001 from other sources that AT&T Wireless had begun deploying its GSM network but was not offering E-OTD-capable handsets. AT&T Wireless did not make a filing notifying the Commission that its deployment of E-OTD technology in its GSM network and its deployment of E-OTD-capable handsets would be delayed until it filed its waiver modification request on February 1, 2002, the same date that it filed its first Quarterly Report, and after its receipt of the Enforcement Bureau LOI. Thus, in addition to apparently violating Section 1.65, AT&T Wireless also apparently willfully and repeatedly violated the terms of the *GSM Waiver Order*.

### C. AT&T Wireless’s Apparent Liability for a Forfeiture

22. In light of AT&T Wireless’s apparent willful and repeated violations of Sections 1.65, 20.18(g)(1)(i) and 20.18(g)(2) of the Rules, we find that a forfeiture is warranted. Section 503(b)(1)(B) of the Communications Act of 1934, as amended, (“Act”) states that any person who willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable for a forfeiture penalty.<sup>57</sup> Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$120,000 for each violation by a common carrier, or each day of a continuing violation, up to a statutory maximum of \$1,200,000 for a single act or failure to act.<sup>58</sup> In determining the appropriate forfeiture amount, we must consider the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>59</sup>

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<sup>56</sup> *GSM Waiver Order*, 16 FCC Rcd at 18261.

<sup>57</sup> 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(2).

<sup>58</sup> 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2).

<sup>59</sup> 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100 (1997); 47 C.F.R. § 1.80(b)(4).

23. Considering all of the enumerated factors and the particular circumstances of this case, we find that AT&T Wireless is apparently liable for an aggregate forfeiture in the amount of \$2.2 million for its apparent violations of Sections 1.65, 20.18(g)(1)(i) and 20.18(g)(2) of the Rules. Section 1.80 of the Rules and the Commission's *Forfeiture Policy Statement* establish a base forfeiture of \$3,000 for violations of Section 1.65.<sup>60</sup> The circumstances of this case, however, appear to justify a substantial increase in the base amount for a Section 1.65 violation under the upward adjustment criteria contained in Section 1.80 and the *Forfeiture Policy Statement*.<sup>61</sup> First, AT&T Wireless's conduct here appears to be egregious. In this regard, the violation of Section 1.65 occurred on a material issue in a significant Commission proceeding. For AT&T Wireless to keep the Commission and other interested parties uninformed of material inaccuracies relating to its E911 waiver request is extremely serious. Further, the Section 1.65 violation continued for approximately three months, from August 16, 2001 (30 days after its obligation under Section 1.65 arose) until November 13, 2001. For a full three months before the *GSM Waiver Order* was issued, AT&T Wireless knew that its waiver request was no longer substantially accurate and complete. Even after the Commission issued the *GSM Waiver Order*, which relied substantially on the representations in its waiver request, AT&T Wireless did not come forward and bring the matter to the Commission's attention. Moreover, AT&T Wireless apparently violated the terms of the *GSM Waiver Order* by failing to make a supplemental filing informing the Commission that it was not going to comply with the deployment schedule requirements set forth in the E911 rules.

24. In addition, in the *Forfeiture Policy Statement*, the Commission made clear that companies with higher revenues, such as AT&T Wireless,<sup>62</sup> could expect forfeitures higher than those reflected in the base amounts:

[O]n the other end of the spectrum of potential violations, we recognize that for large or highly profitable communication entities, the base forfeiture amounts ... are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level.... For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts ..., we intend to take into account the subsequent violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.<sup>63</sup>

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<sup>60</sup> 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section I. Base Amounts for Section 503 Forfeitures; *Forfeiture Policy Statement*, 12 FCC Rcd at 17114, Appendix A, Section I.

<sup>61</sup> 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures; *Forfeiture Policy Statement*, 12 FCC Rcd at 17117, Appendix A, Section II.

<sup>62</sup> In 2001, AT&T Wireless had total revenues of \$13.6 billion with operating income of \$598 million. See AT&T Wireless Annual Report 2001 at 2 (2002).

<sup>63</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17099-100. See also 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

The statutory maximum for a continuing violation of Section 1.65 is \$1.2 million. While it is unclear whether such a forfeiture will act as a sufficient deterrent to AT&T Wireless against future violations of Section 1.65, we believe that anything less is unlikely to do so. Therefore, in consideration of the facts of this case and in accordance with Section 503(b)(2)(B) of the Act, we find that AT&T Wireless is apparently liable for the statutory maximum \$1.2 million forfeiture for its apparent violation of Section 1.65.

25. Section 1.80 of the Rules and the *Forfeiture Policy Statement* do not establish base forfeiture amounts for violations of Section 20.18(g)(1)(i) and 20.18(g)(2) of the Rules.<sup>64</sup> However, we think that substantial proposed forfeitures for these violations are warranted. Violation of the E911 rules is extremely serious because these rules are intended to promote safety of life. Furthermore, AT&T Wireless clearly knew prior to October 1, 2001 that it was not going to comply with these requirements, but it did not seek waivers of these requirements until February 1, 2002, after the Enforcement Bureau began its investigation into AT&T Wireless's potential non-compliance. We also note that the violations of Section 20.18(g)(1)(i) and 20.18(g)(2) are continuing violations and that each unsatisfied PSAP request is a separate violation of Section 20.18(g)(2). Finally, as discussed above, AT&T Wireless's ability to pay must be considered in setting a proposed forfeiture amount. Therefore, taking these facts into account and in accordance with Section 503(b)(2)(B) of the Act, we find that AT&T Wireless is apparently liable for a forfeiture in the amount of \$500,000 for its apparent violation of Section 20.18(g)(1)(i) and a forfeiture in the amount of \$500,000 for its apparent violation of Section 20.18(g)(2).

#### IV. CONCLUSION

26. We find AT&T Wireless apparently liable for a total forfeiture of \$2.2 million. AT&T Wireless apparently willfully and repeatedly violated Section 1.65 of the Rules concerning the disclosure of information that is of "decisional significance" or that renders prior filings "no longer substantially accurate and complete in all significant respects." AT&T Wireless also apparently willfully and repeatedly violated the terms of the *GSM Waiver Order* by failing to make a supplementary filing notifying the Commission that it was not going to comply with the deployment schedule requirements set forth in the E911 rules. Additionally, we conclude that AT&T Wireless failed to begin selling and activating location-capable handsets by October 1, 2001 in apparent willful and repeated violation of Section 20.18(g)(1)(i) of the Rules and failed to implement any network or infrastructure upgrades necessary to provide E911 Phase II service and begin providing service within six months of a valid PSAP request or by October 1, 2001, whichever is later, in apparent willful and repeated violation of Section 20.18(g)(2) of the Rules, and without even filing a waiver request.

#### V. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, AT&T Wireless Services, Inc. is hereby NOTIFIED of this APPARENT LIABILITY

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<sup>64</sup> The fact that there are no established base forfeiture amounts for these violations does not indicate that no forfeiture should be imposed. The *Forfeiture Policy Statement* states that "... any omission of a specific rule violation from the ... [forfeiture guidelines] ... should not signal that the Commission considers any unlisted violation as nonexistent or unimportant. *Forfeiture Policy Statement*, 12 FCC Rcd at 17099. The Commission retains the discretion, moreover, to depart from the *Forfeiture Policy Statement* and issue forfeitures on a case-by-case basis, under its general forfeiture authority contained in Section 503 of the Act. *Id.*

FOR A FORFEITURE in the amount of two million, two hundred thousand dollars (\$2,200,000) for willful and repeated violations of Sections 1.65, 20.18(g)(1)(i) and 20.18(g)(2) of the Rules.

28. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this *Notice of Apparent Liability*, AT&T Wireless Services, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

29. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note NAL/Acct. No. 200232100002 and FRN # 0006-1660-29. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operation Group, 445 12th Street, S.W., Washington, DC 20554.<sup>65</sup>

30. The response if any must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, ATTN: Enforcement Bureau – Technical and Public Safety Division, and must include NAL/Acct. No. 200232100002.

31. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

32. IT IS FURTHER ORDERED that a copy of this *Notice of Apparent Liability* shall be sent by Certified Mail Return Receipt Requested to Douglas I. Brandon, Vice President, External Affairs and Law, AT&T Wireless Services, Inc., Fourth Floor, 1150 Connecticut Avenue, N.W., Washington, DC 20036, and to Michelle M. Mundt, Esq., Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C., 701 Pennsylvania Avenue, N.W., Suite 900, Washington, D.C. 20004.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>65</sup> See 47 C.F.R. § 1.1914.